Supreme Court, U.S.
FILED
FEB 11 1992
OFFICE OF THE CLERK

NO. 91-1296

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1991 TERM

TOM R. STEPHENSON, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
PETITIONER,

-VS-

THE OKLAHOMA TURNPIKE AUTHORITY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the 11th Amendment bar claims against the Oklahoma Turnpike Authority for present and future monetary, declaratory, and injunctive relief asserted under Section 1 of the 14th Amendment, and premised upon a claim of denial of equal protection of law?

2. Does a Federal Court of Appeals have the rulemaking power to withhold precedential effect and value of its opinions by adoption of an "unpublished opinion" rule?

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PETITION FOR WRIT OF CERTIORARI

COMES now Tom R. Stephenson, the Petitioner herein, and, pursuant to Rule 14, petitions this Honorable Court for a Writ of Certiorari.

OTHER OPINIONS: US District Court, Western District of Oklahoma (Appendix A-2); Unpublished Order And Judgment of US Court of Appeals, Tenth Circuit (Appendix A-1).

JURISDICTIONAL GROUNDS: Date of Judgment to be reviewed: November 14, 1991; Rehearing Order: None; Rule 12.3 Cross-Petition: None; Statutory jurisdiction of US Supreme Court: 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

1. Amendment 11, US Constitution (Appendix A-3).

2. Section 1, Amendment 14, US Constitution (Appendix A-4).
3. Title 69 Oklahoma Statutes, Section 1711 (Appendix A-5).
4. Rule 36.3, US Court of Appeals, Tenth Circuit (Appendix A-6).

STATEMENT OF THE CASE

This case seeks present and future monetary relief, as well as declaratory and injunctive relief, from the Oklahoma Turnpike Authority, under the 14th Amendment to the US Constitution and other applicable federal statutes, based upon the Authority's implementation of a toll collection system which permits a reduction in the rate of toll charged to vehicles within already designated vehicle classes, said toll reduction being based solely upon whether or not turnpike users elect to participate in a toll paying system whereby specified sums of money are deposited "up-front" with the

Authority, with toll deductions then being made from a depositor's account.

The Petitioner, and the class he seeks to represent, are members of the motoring public, within already designated vehicle classes, who use the Authority's turnpikes, but who either cannot afford to pre-pay the specified toll deposit, or who do not desire to pre-pay same, and are thereby denied benefit of the toll reduction afforded other members of the same vehicle class.

Oklahoma law creates the Oklahoma Turnpike Authority as a separate and distinct body corporate and politic, insures its freedom from any financial ties to the general public treasury of the State of Oklahoma, and authorizes the Authority to sue and be sued, and to fix and charge tolls for use of the Authority's turnpikes.

In fixing and collecting of tolls, the Oklahoma law further mandates that there shall be no discrimination against any group or class or individual member thereof. (See applicable Oklahoma law at Appendix A 5).

The Authority has, long since, created reasonable vehicle classes for toll purposes, based upon vehicle size or number of axles, with the larger vehicles paying greater tolls than smaller vehicles, or vehicles with fewer axles. Until January 1, 1991, all vehicles within any designated vehicle class paid the exact same toll for traversing the same distance over the Authority's turnpikes.

On January 1, 1991, the Authority established a new and higher schedule of tolls for all previously created vehicle classes. Contemporaneous therewith, the Authority instituted a toll paying system called "Pikepass", whereby motorists who participate therein are required to deposit "up-front" with the Authority specified sums of money,

thereby allowing "Pikepass" participants access to, and use of, the Authority's turnpikes as reduced tolls, less than the amount of toll charged to other vehicles within the same vehicle class who are not "Pikepass" participants.

The Petitioner's US District Court Complaint alleges that this dual toll system and structure, within already designated vehicle classes, is a violation of the applicable Oklahoma law, and, as such, is openly discriminatory and a denial of equal protection of the laws guaranteed by Section 1 of the 14th Amendment to the US Constitution.

The Authority moved to dismiss Petitioner's Complaint claiming, inter alia, that Petitioner's equal protection claims asserted under the 14th Amendment are barred by the 11th Amendment. The District Court agreed and ordered the case dismissed. (See District Court Order at Appendix A 2).

Timely appeal was perfected to the US Court of Appeals for the Tenth Circuit, which, in a three paragraph non-precedential Order And Judgment, entered pursuant to Tenth Circuit Rule 36.3, affirmed the District Court, and held that Petitioner's 14th Amendment claims are barred by the 11th Amendment. (See Tenth Circuit Judgment at Appendix A-1).

STATE COURT JUDGMENT TO BE REVIEWED: None.

JURISDICTION OF COURTS BELOW:

1. District Court: 14th Amendment, 42 USC §1983, 28 USC §§ 1331, 1343(3), 1343(4) and 2202.
2. Tenth Circuit: 28 USC §1291.

ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

A. THE TENTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH A DECISION OF THE SEVENTH CIRCUIT ON THE SAME ISSUE.

Petitioner seeks relief under Section 1 of the 14th Amendment, alleging a denial of equal protection of the laws. The relief is sought against the Oklahoma Turnpike Authority, a body corporate and politic, created by the statutes of the State of Oklahoma, which, by law, can sue and be sued. Eventhough the Authority has no financial ties to the general treasury of the State of Oklahoma, the District Court below dismissed Petitioner's Complaint, holding that his equal protection claims are barred by the 11th Amendment.

As the matter now stands in the Tenth Circuit, equal protection claims asserted under Section 1 of the 14th Amendment are barred by the 11th Amendment. However, in the Seventh Circuit, such claims are specifically approved, and the 11th Amendment is not a bar. See US v Board of School Commissioners of Indianapolis, Ind., 503 F2d 68, at page 82 (7th Cir. 1974).

There is, therefore, a direct conflict between the circuits on this issue, and a resolution thereof from this Court is needed.

B. THE TENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH A DECISION OF THE US SUPREME COURT.

In a relatively recent opinion, this Court has had an occasion to address the issue of whether or not the 11th Amendment is a bar to the

assertion of present, continuing, and future denial of equal protection claims (as does the Petitioner's Complaint in this case). This Court has held that the 11th Amendment does not afford immunity to such claims and is not a bar to the assertion thereof. See Papasan v Allain, 478 US 265 (1986).

The Tenth Circuit's decision in this case, is, therefore, in conflict with recent decisions of this Court, and review should be granted to correct the error.

C. THE TENTH CIRCUIT'S "UNPUBLISHED OPINION" RULE IS IN CONFLICT WITH THE RULES OF OTHER CIRCUITS AND EXCEEDS ITS RULEMAKING AUTHORITY.

The Tenth Circuit's Order And Judgment in this case was entered pursuant to its Rule 36.3, commonly called the "unpublished opinion"

rule (See text of Rulw 36.3 at Appendix A-6).

It is respectfully submitted that federal courts of appeals lack the rulemaking power to withhold precedential effect and value of their opinions by the adoption of such a rule.

Scholors have addressed the issue (See Unreported Decisions In The US Courts of Appeals, 63 Cornell L. Rev. 128, and The Non-Precedential Precedent, 78 Col. L. Rev. 1167), and have acknowledged the existence of a non-uniform policy on the subject, and have concluded that there should be uniformity among the circuits.

Additionally, in dissenting to the adoption of Rule 36.3, Tenth Circuit Chief Judge Holloway, joined by Judges Barrett and Baldock, assert

their opinion of the unsoundness of such a rule. (See Dissenting Opinion at US Court of Appeals, 10th Circuit Rules, App. III, 28 USCA West Supp. 1988).

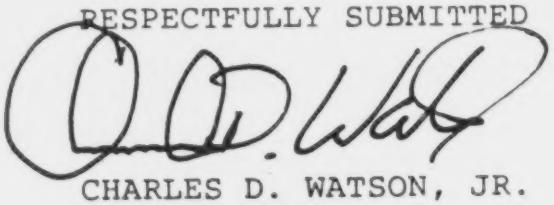
This Court has previously granted certiorari on this issue, but did not address the issue in its opinion (See Bowder v Director, Dept. of Corrections of Ill., 434 US 257 (1978).

Now is the time, and this is the case, to address the issue, and adopt a uniform policy prohibiting the "no-citation" rules.

Petitioner's Complaint states valid, judicially cognizable claims for relief, and the courts below have erred in applying 11th Amendment immunity as a bar to those claims.

WHEREFORE, Petitioner prays that his Petition For Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED



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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

TOM R. STEPHENSON, on behalf of himself and all others similarly situated, Plaintiff-Appellant, v. THE OKLAHOMA TURNPIKE AUTHORITY Defendant-Appellee.	FILED NOV 14 1991 ROBERT . HOECKER Clerk No.91-6162 (D.C.No.CIV-91-5-W) (W.D.Okla.)

ORDER AND JUDGMENT*

Before ANDERSON, BRORBY, and TACHA, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

The case is therefore ordered submitted without oral argument.

Appellant Tom R. Stephenson appeals a district court order dismissing his complaint. The district court held that Stephenson's suit against the Oklahoma Turnpike Authority was barred by the eleventh amendment. On appeal, Stephenson argues that the Turnpike Authority has waived its eleventh amendment immunity by consenting to suit. Stephenson also argues that equal protection claims are not barred by the eleventh amendment.

After carefully reviewing the record, we AFFIRM for substantially the same reasons given by the district court. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

TOM R. STEPHENSON, On Behalf Of Himself And All Others Similarly Situated,	)	FILED MAR 28 1991 Robert D. Dennis Clerk, US District Court
Plaintiff,	)	
vs.	)	No. CIV-91-05-W
THE OKLAHOMA TURNPIKE AUTHORITY,	)	
Defendant.	)	

ORDER

This matter comes before the Court on the Motion to Dismiss, or Abstain filed by the defendant, the Oklahoma Turnpike Authority (the Authority), wherein the Authority has requested the Court to dismiss the plaintiff's claim or in the alternative, to abstain from proceeding in this action until an Oklahoma state court has had the opportunity to rule on the issues raised in this litigation. The plaintiff,

Tom R. Stephenson, on behalf of himself and all others similarly situated, [1] has responded in opposition to the motion and based upon these submissions, the Court makes its determination. In so doing, the Court finds the issue of immunity under the eleventh amendment to the United States Constitution dispositive of this matter and thus, has not considered the other arguments raised by the parties.

This lawsuit arises over the Authority's decision to institute its "Pikepass" program. Under this program, members of the motoring public who desire to use state turnpikes may purchase an electronic device which permits easier access to the turnpikes. The plaintiff has argued that the purchasers of these electronic devices not only have paid reduced turnpike tolls but also will not be subjected to any toll increases. The plaintiff, who has brought this lawsuit under title 42, section 1983 of the United States Code, has contended

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[1] In his complaint, the plaintiff has sought certification of a class under Rule 23, F.R. Civ. P.

that the Authority has acted arbitrarily, discriminatorily and in violation of the equal protection clause of the fourteenth amendment to the United States Constituion and in violation of title 69, section 1711 of the Oklahoma Statutes.

The Authority is a statutorily-recognized instrumentality of the State of Oklahoma.[2] 69 O.S. § 1703 (a). A suit generally may not be maintained directly against the state itself or against an agency or department of the state unless the state has waived its eleventh amendment immunity and this bar to suit applies whether the relief sought is legal or equitable in nature.

The plaintiff has argued that the Authority has waived its immunity to suit and in support of this argument, has cited title 69, section 1703 (a) of the Oklahoma Statutes

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[2]The Court finds irrespective of the eleventh amendment, the plaintiff's suit for monetary relief under section 1983 is barred by the United States Supreme Court's decision in Will v. Michigan Department of State Police, 491 U.S. 58 (1989) (states are not "persons" under section 1983). States however do qualify as "persons" under section 1983 when suit is for injunctive relief.

which provides that "the Authority may sue and be sued. . . . " 69 O.S. § 1703 (a). This general waiver of sovereign immunity however has been narrowly circumscribed by title 69, section 1705 (d) of the Oklahoma Statutes which provides that the Authority is empowered

> "[t] o sue and be sued in contract, reverse condemnation, equity, mandamus and similar actions in its own name . . . . "

Id. § 1705 (d).

> "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, . . . waiver [will be found] only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' "

Edelman v. Jordan, 415 U.S. 651, 673 (1974) (quoting Murray v. Wilson Distilling Co., 213 U. S. 151, 171 (1909)). Furthermore, a state's general waiver of sovereign immunity that might subject it to suit in state court is not enough to waive the immunity guaranteed by the eleventh amendment. E.g.,

Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981) (per curiam).

The Court finds that section 1705 (d) is not a general and unlimited waiver of suit in both state and federal court; rather, the authority "to sue and be sued" is limited to certain express exceptions: contract, reverse condemnation, equity, mandamus and similar actions. That portion of the instant lawsuit which seeks compensatory and punitive damages for constitutional violations does not come within one of these receognized exceptions.

The Court finds further that although the plaintiff's requested injunctive relief might arguably fall within the recognized exception for cases in equity, this suit is nevertheless barred in federal court. While the State of Oklahoma may have waived its sovereign immunity to certain suits in state court, there

is no unequivocal and express declaration or any overwhelming implication that the State of Oklahoma intended to waive any rights under the eleventh amendment to the United States Constitution. Cf. 51 O.S. § 152.1 (as to tort causes of action, state and its instrumentalities waive sovereign immunity, but in so doing, "it is not the intent of the state to waive any rights under the Eleventh Amendment. . . .").

Accordingly the Court finds that the defendant's Motion to Dismiss should be and is hereby GRANTED.

ENTERED this 28th day of March, 1991.

/s/ Lee R. West

LEE R. WEST
UNITED STATES DISTRICT JUDGE

CONSTITUTION OF THE

UNITED STATES

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

CONSTITUTION OF THE

UNITED STATES

AMENDMENT XIV - SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process or law; nor deny to any person within its jurisdiction the equal protection of the laws.

§1711 - TOLLS, CONTRACTS FOR USE OF PORTIONS OF PROJECT, RENTS AND CHARGES, USE OF REVENUES, SINKING FUNDS, REGULATION OF MOTOR CARRIERS.

*** The Authority shall not discriminate against any group or class or individual member thereof in fixing the amount of toll, rents, or charge for the use of the turnpike project.

US COURT OF APPEALS

TENTH CIRCUIT

RULE 36.3

36.3 CITATION OF UNPUBLISHED OPINIONS/ORDERS AND JUDGMENTS.

Unpublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for the purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. A dissent from this rule by Chief Judge Holloway, Judges Barrett, and Baldock, appears at US Court of Appeals, 10th Circuit Rules, App. III, 28 USCA (West Supp. 1988).

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MAR 12 1992
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In The

Supreme Court of the United States

October Term, 1991

TOM R. STEPHENSON, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

vs.

THE OKLAHOMA TURNPIKE AUTHORITY,

Respondent.

Petition For Writ Of Certiorari To the United States Court Of Appeals For The Tenth Circuit

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OBJECTION TO CERTIORARI

PRELIMINARY STATEMENT

Rule 10 of this Court, withholds certiorari unless there are "special and important reasons therefor." This case satisfies neither criteria.

Petitioner does not speak for a discriminated class. His "class" is really diverse individuals opting not to buy a "Pikepass". *Stanglin v. City of Dallas*, ___ U.S. ___, 109 S.Ct. 1594-95 (1989) implicitly rejected the notion that patrons of a certain dance hall constituted a "suspect class," noting that "[M]ost are strangers to one another, and the dance hall admits all who are willing to pay the admission fee." 109 S.Ct. at 1595. Primarily, defining "association" for First Amendment purposes, *Stanglin* negates the significance of Petitioner's purported Equal Protection claim. Law must apply equally to all parties regardless of race, creed, or other suspect classification. *Schilb v. Kuebel*, 404 U.S. 357, 364, 92 S.Ct. 479, 484, 30 L.Ed.2d 502 (1971). Anyone may buy a "Pikepass". No one is obligated. Diverse factors influence any individual decision. While "Pikepass" holders pay lower tolls, that is not unconstitutional. *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970); *Williams v. Vermont*, 472 U.S. 14, 27, 105 S.Ct. 2465, 2473 (1985). Petitioner presents no important constitutional issue on behalf of any discriminated class.

"Pikepass", and the anti-discrimination law it allegedly violates, arise under state law. Petitioner cites 69 O.S. 1981 Section 1711 at his Appendix 5. No court in

Oklahoma has addressed this issue. State law alone cannot support Federal jurisdiction. The Fourteenth Amendment does not bring within Federal control everything done by a state instrumentality that is simply illegal under state laws. *Owensboro Waterworks Co. v. Owensboro,* 200 U.S. 38, 47, 26 S.Ct. 249, 252 (1906). Given Petitioner's theory, independent state grounds predominate and are outcome determinative. Under *Harrison v. National Association for the Advancement of Colored People,* 360 U.S. 167, 79 S.Ct. 1025 (1959): "[T]hese enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality." 360 U.S. at 178, 79 S.Ct. at 1030.

In *Planned Parenthood Association v. Ashcroft,* 462 U.S. 476, 493, 103 S.Ct. 2517, 2526, 76 L.Ed.2d 733 (1983) this Court held "the appropriate course of judicial restraint was abstention" in an unsettled area of state law. In *Ashcroft,* abstention was declined because 1) plaintiff did not raise the abstention issue below and 2) Missouri had no certification procedure. Neither of these defects exist here. (See Appendix 1 – Respondent's Motion to Dismiss and Appendix 2 – Oklahoma's Certification Statute, 12 O.S. 1981 Section 1601-1612). Abstention is also appropriate under *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) providing, *inter alia,* for abstention where unsettled questions of state law may make it unnecessary to address federal constitutional issues.

Merits aside, these policy reasons, *ipso facto,* warrant denial of certiorari.

ARGUMENT

I.

THE TENTH CIRCUIT'S RULING DOES NOT IRRECONCILABLY CONFLICT WITH THIS COURT'S RULING IN *PAPASAN*

Subpart B of the Petition (pp. 8-9) claims the decision below conflicts with *Papasan v. Allan*, 478 U.S. 265, 106 S. Ct. 2932 (1986). *Papasan* reaffirmed that "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." 478 U.S. at 278, 106 S.Ct. at 2932. Thus, the lower courts properly found Petitioner's claims for damages *qua* damages run afoul of the Eleventh Amendment's bar. To this extent, there is complete agreement with *Pasasan*.

Petitioner's "present, continuing and future denial of equal protection claims," rest mainly upon state law. *Papasan* noted, quoting *Pennhurst State School and Hospital v. Haldeman*, 465 U.S. 89, 104 S.Ct. 900 (1984) that the Eleventh Amendment bars such claims "because federal supremacy is not implicated." 478 U.S. at 277, 106 S.Ct. at 2940. Petitioner's theory on "Pikepass" relies heavily upon 69 O.S. 1981 Section 1711. This state law question should not be addressed in federal court. Indeed *Pennhurst*, at 465 U.S. at 106, 104 S.Ct. at 911, stated "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." This case invites such an intrusion. The lower courts, in conformity with *Papasan* and *Pennhurst*, wisely declined.

Papasan authorized monetary relief in one narrow circumstance: where some expenditure may be necessary to "ensure 'compliance in the future with a substantial

federal question determination.' " 478 U.S. at 282, 106 S.Ct. at 2932. This case involves neither a future expenditure program nor a substantial federal question. *Papasan* is not a relevant consideration. In fact, the "Claims for Relief" section of Petitioner's Complaint (Appendix 3), seeks compensatory and punitive damages only. (See Paragraphs b and c). He has pled no damage within the embrace of *Papasan*. Only extraordinary issues warrant review by this Court if not pressed below. *Tacon v. Arizona*, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973); *Lawn v. United States*, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958).

Finally, *Papasan* does not apply without a federal violation to enjoin. Defining discrimination, *McCleskey v. Kemp*, 481 U.S. 277, 298, 107 S.Ct. 1756, 1770 (1987) held:

> [D]iscriminatory purpose requires more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' and not merely 'in spite of' its adverse affects upon an identifiable group. For this claim to prevail, [a plaintiff] would have to prove that the [defendant] enacted or maintained [the program] *because of* an anticipated discriminatory effect. (Citations deleted; emphasis by Court).

Moreover, a suspect classification is: one "saddled with such disabilities or subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process". *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2567 (1976). Discrimination is "invidious",

thus unlawful, only if it adversely affects a traditionally disadvantaged group along suspect lines or is not rational in light of the respective interests of the parties. *Local No. 1 (ACA) Etc. v. International Brotherhood of Teamsters, Etc.*, 419 F.Supp. 263, 277 (W.D. Pa. 1977). Petitioner's alleged "class" cuts across all strata. It is neither suspect nor invidiously discriminated against. "Pikepass" is available to all. Persons may opt in or out by choice. Disparity resulting from "wholly voluntary and unfettered choice of private individuals" presents no equal protection issue. *Bazemore v. Friday*, 478 U.S. 385, 407, 106 S.Ct. 3000, 3012 (1986). This Court does not gratuitously scrutinize law or policy, neutral in its terms and intent, which may distress one of "any of the diverse and shifting groups that make up the American people." *James v. Valtierra*, 402 U.S. 137, 142, 91 S.Ct. 1331, 1334 (1971). The Constitution must not be trivialized to the point of making every objection to a government policy a matter of constitutional proportion.

Because the lower courts complied with *Papasan* and other existing precedents, certiorari should be denied.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS WHICH NEEDS TO BE RESOLVED.

Petitioner alleges a conflict exists between this opinion and *United States v. Board of School Commissioners of Indianapolis*, 503 F.2d 68 (7th Cir. 1974) which held a federal court had jurisdiction to compel school desegregation. That court found the following circumstances, not present here:

1. Federal judicial action was necessary to enforce the Fourteenth Amendment. 503 F.2d at 87. As discussed previously, no genuine Constitutional issue exists in this case.

2. The Seventh Circuit action arose, in part, under 42 U.S.C. Section 2000C-6 which specifically authorized such action. In contrast, Petitioner below:

   (i) Paid lip service to 42 U.S.C. Section 1983 but alleged no facts demonstrating its applicability, contrary to case law. *Wise v. Bravo*, 666 F.2d 1328, 1333 (10th Cir. 1981); *Leer v. Murphy*, 844 F.2d 628 (9th Cir. 1988); *Vanderplas v. City of Muskogee*, 753 F.2d 555 (7th Cir. 1985).

   (ii) Made conclusory allegations only, in violation of general rules of pleading. *Ryan v. Scoggins*, 245 F.2d 54 (10th Cir. 1957); *Blackburn v. Fish University*, 443 F.2d 121 (6th Cir. 1970).

   (iii) Showed neither discriminatory intent (*Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)) nor a substantive violation of federal right apart from a blanket reference to Section 1983 and the Fourteenth Amendment (*Garcia v. Wilson*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985)).

Conflict between circuits is far more imagined than real. The *Indianapolis* holding is wholly distinguishable. Local precedent shows no danger that federal rights will languish in this Circuit for want of judicial action. Our judiciary is aware of their power and duty. *Indian Country, U.S.A., Inc. v. Oklahoma,* 829 F.2d 967 (10th Cir. 1987); *Board of Education of Oklahoma City Public Schools v. Dowell,* 111 S.Ct. 630 (1991). Finally the lack of precedential value (see Tenth Circuit Rule 36.3 attached as Appendix 3 to the Petition) makes it unnecessary to resolve a conflict among the circuits.

III.

NON-PUBLICATION DOES NOT PRESENT A VALID ISSUE FOR CERTIORARI

Petitioner challenges Tenth Circuit Rule 36.3 allowing non-published (non-precedential) opinions. He seems to believe that *Browder v. Dept. of Corrections,* 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978) takes issue with this practice. Appellant raised the issue there. This Court summarily declined to consider it, as well as other issues. 434 U.S. at 260, 98 S.Ct. at 558. It warrants no greater attention now. Appellate Procedure 47 allows the individual circuits "to regulate their practice in any manner not inconsistent with these rules." 28 U.S.C. Section 2071 allows broad rule making power.

Certiorari jurisdiction should be used sparingly. *Re Lau Ow Bew,* 141 U.S. 583, 12 S.Ct. 43, 35 L.Ed. 868 (1891); *Seney v. Swift & Co.,* 260 U.S. 146, 43 S.Ct. 22, 67 L.Ed. 176 (1922). Given the general acceptance of similar practice, and its benefit to judicial economy, certiorari should be

denied. If this Court takes issue with the practice, rulemaking via 28 U.S.C. § 2072 seems more appropriate.

CONCLUSION

The Tenth Circuit summarily affirmed dismissal "for substantially the same reasons given by the district court." That brief opinion, and the procedure leading to it, should have closed a case already taking up more federal judicial time than it deserved. Certiorari should be denied.

Respectfully submitted,

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APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

TOM R. STEPHENSON, On Behalf of Himself And All Others Similarly Situated, Plaintiff, -vs- THE OKLAHOMA TURNPIKE AUTHORITY, Defendant.	)	CIV-90-00005-W (Filed Jan. 28, 1991)

DEFENDANT'S MOTION TO DISMISS OR ABSTAIN

Pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure and the authority set forth in the supporting brief filed contemporaneously herewith, defendant prays that this case be dismissed for want of a claim within this Court's subject matter jurisdiction. Alternatively, defendant prays that this Court abstain from further proceedings in this case, at least until such time as an Oklahoma Court has an opportunity to rule on potentially dispositive issues of state law.

TURNER, TURNER & BRAUN

By: /s/ Robert J. Turner
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CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the above and foregoing DEFENDANT'S MOTION TO DISMISS OR ABSTAIN was mailed this date to:

Leslie L. Conner, Jr.
James M. Little
Conner & Little
P. O. Box 26568
Oklahoma City, OK 73126

Doyle Watson
Charles D. Watson, Jr.
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Drumright, OK 74030
Attorneys for Plaintiff and
Plaintiff Class Members

Dated this 28th day of January, 1991.

/s/ Richard J. Goralewicz

APPENDIX II

UNIFORM CERTIFICATE OF QUESTIONS OF LAW ACT

20 O.S. 1991 Sections 1601 through 1611

Section 1601. Short Title

This act may be cited as the Uniform Certification of Questions of Law Act.

Section 1602. Power to answer

The Supreme Court and the Court of Criminal Appeals respectively may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a Court of International Trade, the Judicial Panel on Multidistrict Litigation, the United States Claims Court, the United States Court of Military appeals, the United States Tax Court, or the highest appellate court or the intermediate appellate court of any other state, when requested by the certifying court of there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court or Court of Criminal Appeals of this state.

Section 1603. Method of invoking

This act may be invoked by an order of any of the courts referred to in Section 1602 of this title upon the

court's own motion or upon the motion of any party to the cause.

Section 1604. Contents of certification order

A certification order shall set forth:

1. The question of law to be answered; and

2. A statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

Section 1605. Preparation of certification order

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court or Court of Criminal Appeals by the clerk of the certifying court under its official seal. The court to which the certification order is directed may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the Court, the record or portion thereof may be necessary in answering the questions.

Section 1606. Cost of certification

Fees and costs shall be the same as in civil appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

Section 1607. Briefs and argument

Proceedings in the Supreme Court or Court of Criminal Appeals shall be as provided by rule of the Court or by law governing briefs and arguments.

Section 1608. Opinion

The written opinion of the Supreme Court or Court of Criminal Appeals stating the law governing the questions certified shall be sent by the Clerk under the seal of the Court to the certifying court and to the parties.

Section 1609. Power to certify

The Supreme Court or the Court of Criminal Appeals of this state, on the court's own motion or the motion of any party, may order certification of questions of law to the highest court of any state when it appears to the certifying court that there are involved, in any proceedings before the court, questions of law of the receiving state which may be determinative of the cause then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

Section 1610. Procedure on certifying

The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

Section 1611. Construction

This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHAMA

TOM R. STEPHENSON, On Behalf of Himself And All Others Similarly Situated,	)	No. CIV – 91 0005 W
Plaintiffs,	)	(Filed Jan. 3, 1991)
-vs-	)	
THE OKLAHOMA TURNPIKE AUTHORITY,	)	
Defendant.	)	

COMPLAINT

Comes now the Plaintiff above named, and for and on behalf of himself and all others similarly situated, alleges and states:

JURISDICTION

1. That this action is brought pursuant to the provisions of Title 42, USC §1983 and the 14th Amendment to the Constitution of the United States of America. State law pendant claims are also made against the defendant herein. That the jurisdiction of this Court is invoked pursuant to the provisions of 42 USC §1983, 28 USC §1331, 28 USC §1343(3), 28 USC §1343(4), and 28 USC §2202.

VENUE

2. That the defendant, the Oklahoma Turnpike Authority, is a body corporate and politic created by the statutes and laws of the State of Oklahoma [69 OS §1703(a)], with its principal place of business located and situated in the Western Federal Judicial District of the State of Oklahoma and may be sued therein by said name and venue of this action lies in this Judicial District pursuant to the provisions 28 USC §1391.

PARTIES

3. That the plaintiff, acting for himself, and for and on behalf of all others similarly situated, is a resident and citizen of the State of Oklahoma and is a member of the motoring public who uses and who desires to continue to use the turnpikes constructed, maintained, and operated by the defendant authority in the State of Oklahoma pursuant to the statutes in such cases made and provided.

4. That the defendant, the Oklahoma Turnpike Authority, is a body corporate and politic, created by the statutes of the State of Oklahoma, and governed and limited thereby, which said defendant has the statutory authority to provide for the construction, maintenance, repair, and operation of turnpikes within the State of Oklahoma.

CLASS ACTION ALLEGATIONS

5. The Plaintiff brings this action pursuant to the provisions of Rule 23, Federal Rules of Civil Procedure,

on behalf of himself and on behalf of all members of a class defined as follows: all members of the motoring public of any vehicle class using the defendant's turnpikes in the State of Oklahoma from and after January 1, 1991 and being required to pay tolls or fares for such usage and who have not purchased a "Pikepass" from the defendant Authority.

6. Plaintiff believes that, after examination of documents and records available, that the evidence will reveal that there are thousands of class members who will be using the turnpikes owned and operated by the defendant Authority and that the class is so numerous that joinder of all members as named parties to this action is impracticable.

7. That there are numerous questions of fact and law common to the class, which said questions relate to the facts involved herein.

8. That the claims of the named plaintiff are typical of the claims of each class member and that the named plaintiff will fairly and adequately represent and protect the interests of the class.

9. That the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications establishing an incompatible standard of conduct for the defendant Authority.

10. That the defendant has acted on grounds generally applicable to the class as a whole thereby making appropriate final relief with respect to the class as a whole.

11. That the questions of fact and of law common to the class predominate over questions affecting only individual class members.

12. That the class action method is superior to other available methods, if any, for the fair and efficient adjudication of this controversy.

13. That the prosecution of this action as a class action will eliminate the possibility of repetitious litigation while also providing redress for claims which may be too small to support the expense of individual complex litigation.

FACTUAL ALLEGATIONS

14. Plaintiff further alleges that the defendant Authority, in the operation of its turnpikes in the State of Oklahoma, from time to time, and pursuant to the statutes of the State of Oklahoma (69 OS §1711) sets and fixes tolls or fares for certain classes of motor vehicles using said turnpikes.

15. Plaintiff further alleges that the aforesaid statutory toll fixing authorization contains the following mandate:

> "The Authority shall not discriminate against any group or class or individual member thereof in fixing the amount of toll, rents, or charge for the use of the turnpike project."

16. Plaintiff further alleges that the Attorney General of the State of Oklahoma, in Opinion No. 69-346, which said Opinion has not been altered, modified,

reversed, or cancelled by operation of law or court opinion, and which said Attorney General's Opinion has the same force and effect as law in the State of Oklahoma has further mandated that the defendant Authority may not grant any commutation or reduction of the rate of toll to be used by vehicles within any designated class other than upon frequency of turnpike use or volume of turnpike use.

17. Plaintiff further alleges that, effective January 1, 1991, the defendant Authority allegedly under and pursuant to its toll setting authority, established and instituted a new, increased, and higher schedule of tolls that had previously been in force and effect for all classes and categories of motor vehicles using the defendant's turnpikes in the State of Oklahoma.

18. Plaintiff further alleges that, contemporaneous therewith, the defendant Authority also instituted a toll paying system which it called "Pikepass" whereby members of the motoring public desiring to use the defendant Authority's turnpikes within the State of Oklahoma could purchase, by prepayment of specified sums of money, a serial numbered electronic device called a "Pikepass" which said "Pikepass" allowed and authorized and does allow and authorize members of the motoring public holding and using same access to and the use of the turnpikes owned and operated by the defendant Authority within the State of Oklahoma at a reduced toll, less than the toll charged for vehicles within the same vehicle class and category which have not purchased and do not hold a "Pikepass".

19. Plaintiff further alleges that the reduced turnpike tolls afforded members of the motoring public using a "Pikepass" are not based upon the frequency of use thereof or the volume of use thereof and, as such, are in violation of the laws of the State of Oklahoma as expressed in the Statutes of the State of Oklahoma and the Attorney General Opinions of the State of Oklahoma having the force and effect of law in that said toll or fare discrepancies discriminate against motorists within the same groups or classes of motor vehicles using the defendant's turnpikes within the State of Oklahoma.

FEDERAL CAUSES OF ACTION

20. Plaintiff further alleges that the acts of the defendant Authority in the setting and fixing of the turnpike tolls and fares as set out above herein are and were done under color of state law and that the actions of the defendant Authority complained of herein evidence a policy of knowledgeable disregard of the applicable laws of the State of Oklahoma and that said discriminatory fixing of different tolls or fares for members of the same motor vehicle category and class are unlawful, arbitrary, unreasonable, invidiously discriminatory, and unconstitutional, and deny and deprive the plaintiff and plaintiff class members herein of rights, privileges, and immunities secured to the plaintiff and plaintiff class members herein by the Constitution of the United States of America, specifically, the constitutional protection afforded by the 14th Amendment to the Constitution of the United States of America prohibiting any state from denying to any person within its jurisdiction equal protection of the law.

STATE PENDENT CAUSES OF ACTION

21. Plaintiff further alleges that the acts and conduct alleged above herein, in addition of violation of Federally protected rights, constitute violations of the laws of the State of Oklahoma and the opinions of the Attorney General of the State of Oklahoma which have the force and effect of law, and, pursuant to the doctrine of pendent jurisdiction, this Court has jurisdiction and authority to hear and adjudicate such state law violation claims.

DECLARATORY JUDGMENT/INJUNCTION CLAIMS

22. Plaintiff further alleges that the acts of the defendant Authority complained of herein are unlawful, arbitrary, unreasonable, invidiously discriminatory, and unconstitutional and, by reason thereof, plaintiff and plaintiff class members are entitled, in addition to other relief requested herein, to an adjudication that said discriminatory toll rates are unlawful, arbitrary, unreasonable, invidiously discriminatory, and unconstitutional and, further, plaintiff and plaintiff class members, in addition to other relief requested herein, are entitled to an injunction permanently enjoining and restraining the defendant Authority from imposing, collecting, or attempting to impose or collect such discriminatory tolls and fares in violation of the laws of the State of Oklahoma.

BAD FAITH/PUNITIVE DAMAGES

23. Plaintiff further alleges that the actions of the defendant Authority complained of herein are and were

done in knowledgeable disregard of the laws of the State of Oklahoma and the Opinions of the Attorney General of the State of Oklahoma which have the same force and effect as law and that said knowledgeable and intentional disregard of the laws of the State of Oklahoma and unequal application thereof, constitute bad faith actions and a knowledgeable, willful, intentional, and reckless disregard for the rights of the plaintiff and plaintiff class members herein and, by reason thereof, in addition to other relief requested herein, plaintiff and plaintiff class members are entitled to recover judgment against the defendant Authority for punitive damages to punish the defendant Authority for such bad faith and knowledgeable and intentional disregard of the laws of the State of Oklahoma and to deter said defendant and others from the same or similar conduct in the future.

CLAIMS FOR RELIEF

WHEREFORE, plaintiff and plaintiff class members, request the following relief herein.

(a) Certification of this action as a class action pursuant to the provisions of Rule 23, Federal Rules of Civil Procedure.

(b) Compensatory damages in such sum as the evidence may show to be attributable to the discriminatory toll differences for all categories of vehicles using the defendant Authority's turnpikes, past, present, and future.

(c) Punitive damages in an amount determined to be adequate to punish the defendant for its unlawful and unconstitutional activities

herein and to further deter said defendant and others from the same or similar future conduct.

(d) A declaratory judgment of this Court declaring and determining the discriminatory toll fixing activities complained of herein to be unlawful, arbitrary, unreasonable, invidiously discriminatory, and unconstitutional.

(e) A permanent injunction against the defendant Authority permanently enjoining and restraining the defendant Authority from imposing or collecting or attempting to impose or collect such discriminatory tolls complained of herein.

(f) Reasonable attorney's fees to be assessed against the defendant Authority in accordance with 42 USC §1988 and Rule 23, Federal Rules in Civil Procedure.

(g) All costs and expenses of this action and litigation, accrued and accruing.

(h) Such other and further relief as to the Court may seem just and proper in the premises.

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